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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

REPLY BRIEF FOR APPELLANT

BERNARD B. BAILEY,
Pro se.

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REPLY BRIEF FOR APPELLANT

Summary of Argument

This appeal should not be dismissed for want of a properly presented substantial Federal question.

1. The hearing afforded by the statute assailed did not meet the requirements of due process. The appellant's participation in the hearing did not satisfy those requirements, or estop the appellant from assailing the statute.

2. First and second assignments of error. The appellant has never contended, and in order to assail the statute it is not necessary to show that due process requires a viewing of the property either before or after the construction of the highway. That due process does not require a view is no ground for the contention that it was not tortious or unlawful for the appellee to mutilate and disfigure the property

while he arbitrarily and willfully held off the viewing of the property, and forced the appellant to accept a false view.

3. Third assignment of error. There is no authority for the view that the Virginia practice is that where the land is taken and used before the award, the award itself includes all interest and damages to which the landowner is entitled up to the time of its rendition. The test is whether the commissioners were authorized to award all interest and damages to which the landowner is entitled, and if the authority exists the test then is whether they indicated in their award that they did not award all interest and damages to which the landowner is entitled. On the basis of these tests, the commissioners did not award any interest, and they did not award any damages beyond the damages for injury to the residue.

That the appellant did not request any specific instructions to be given to the commissioners by the Court on the subject of interest is irrelevant because the question of interest was not submitted to them.

The record of the proceedings in the Circuit Court properly presents the question of interest raised by the appellant. The law of Virginia does not presume that interest is included in the award where, as in this case, the commissioners are not authorized to award interest and indicate plainly in their award that they did not do so.

The due process clause of the Fourteenth Amendment requires that in the taking of land by eminent domain damages must be paid for injuries to the residue. The fact that such damages are recoverable under the Virginia Constitution does not affect the security of the Fourteenth Amendment, and has no bearing whatever upon this appeal.

Argument

This appeal should not be dismissed for want of a properly presented Federal question.

I

General Statement of Requirements of Due Process

Whether the statute assailed violates the due process clause of the Fourteenth Amendment, as contended by the appellant, is a question that can not be disposed of by simply saying that it provides "fair and adequate machinery for ascertaining the compensation and amount of damages" (Appellee's brief, p. 7). The appellee does not attempt to show why it is fair and adequate, and he does not even mention the oppressive and unconstitutional procedural control which the statute vests in him. If, as the appellant contends, the statute violates the Fourteenth Amendment for the reasons given (Appellant's Brief, pp. 18-34) the cases cited by the appellee (p. 7, footnote 1) are wholly irrelevant. If the statute violates the Fourteenth Amendment, the invalidity can not be overcome by saying that the Fourteenth Amendment does not insure immunity from judicial error, or that while the procedure required by the statute is not as desirable as this Court would have it, yet the State of Virginia is to determine what the procedure should be. In determining whether the statute violates the Fourteenth Amendment, the test is not whether there has been a judicial error reviewable by this Court. The test is whether the legislature has violated the Fourteenth Amendment in enacting the statute. In determining whether the procedural control authorized by the statute deprived the appellant of a fundamental right the question is not whether the procedural control is less desirable than some other system of control. The Fourteenth Amendment

does not permit any type of control that operates to deprive one of fundamental rights. The Court would not be justified in ignoring the procedural control on the ground that the Court believes that a more desirable procedure would be to eliminate the procedural control.

The appellee implies that because the appellant "actively participated in said hearing" (Appellee's brief, p. 5) and "makes no charge of any misconduct" (p. 8), the appellant can not assail the procedural control vested in the appellee by the statute. This is not a case of estoppel by voluntary submission to the unconstitutional procedure of the statute. If the statute had authorized the appellant to insist that the property be viewed before disfigurement, or that no view be made after the disfigurement, he would not be in a position to complain. Acting under the statute, the appellee forced the appellant to wait until after the disfigurement before the view was made, and the appellant had no power whatever, and the Court had no power, to prevent the view. If the appellee had contended that the compensation and damages should be assessed without a view, the Court could not have upheld the contention. The appellant did not contend that the statute is invalid because it requires a view. He contended that the statute is invalid because it enables the appellee to control the time for viewing the property, and that the appellee forced the appellant into the position of having the property viewed at a time when it was impossible for the viewers to see the property in its original condition. Estoppel, an equitable doctrine, is not for the benefit of one who is guilty of wrongful or inequitable conduct. Estoppel is allowed to prevent injustice, and it is essential that one who claims estoppel should have proceeded in good faith. Acts induced by his own conduct can not furnish the basis for an estoppel.[1] The appellant's

[1] 31 C. J. S., p. 281, section 75; *R. H. Stearns Co. v. United States*, 291 U. S. 54, 61, 62.

"acceptance" of the false view was not simply induced by the appellee—it was forced by him. There can be no estoppel where the party claiming it has knowledge of the illegality of his acts, or where the assent is to acts which one is powerless to prevent.[2] To estop the appellant would mean that after he had been forced into the position of having a false view made of the property he should have stayed away from the viewing and hearing and should have insisted upon a hearing without a view, and then if successful in overthrowing the statute the appellant could have had a hearing without any viewing of the property at all. That would mean that the appellant would have to wait more than four years after the property was taken before a hearing, and would incur the difficulty of producing evidence and witnesses to prove in 1945, or 1946, what the property was worth in 1941 before the appellee began to operate his statutory control. The appellee is not in a position to claim estoppel by the appellant's "acceptance" of conditions which the appellee created and where the rejection of the conditions would place upon the appellant additional difficulty, expense and risk.

That the amount awarded greatly exceeded what the appellee's counsel in the Circuit Court thought fair is wholly irrelevant and the contention is presumptuous. It is irrelevant that the Virginia Court pronounced the judgment plainly right. The Virginia Court did not pass upon the amount of the award, and even if it had done so, it would have no bearing upon the validity of the statute.

The appellant did not accept any "benefit" under the statute. He contended that he lost a benefit by being forced to have the assessment made on the basis of a false view, and that the statute is invalid on that ground. Both the Circuit Court and the highest Virginia Court held that he

[2] 31 C. J. S., p. 365, section 114.

lost a benefit because by upholding the statute they necessarily held that the appellant had lost the benefit and was entitled to attack the statute. The appellee has not been prejudiced or misled by anything the appellant did. His argument is purely technical and inequitable.[3] It is no stronger than the sordid reasoning of one who overpowers his victim and then seeks to escape responsibility by saying that his victim did not object or try to escape.

II

First and Second Assignments of Error

That the commissioners in viewing the property "would have the same or perhaps greater difficulty in visualizing beforehand the changed conditions which will result from the improvements contemplated" (Appellee's brief, p. 8) is no reason for saying that the appellee should be allowed to hold off the viewing of the property until after he has finished his mutilation and disfigurement, and then force the owner to have the property viewed to determine its original value; and yet that is the sum and substance of the appellee's argument. To uphold it would be to approve spoliation as a means of conferring a benefit upon the state. That the state has not provided a procedure that is fair and inequitable is no reason for preventing the appellant from contesting a procedural control that is unfair to him. It is obviously impossible for viewers to visualize the property in its original condition after it has been mutilated and disfigured by the removal of part of the property and by changing and covering up another part. The viewers did not look at blue prints. They looked at the property itself in its changed condition. If the appellee's argument is sound then there would be no objec-

[3] *Ashwander* v. *T. V. A., etc.*, 297 U. S. 288, 323.

tion if the statute gave to the owner the exclusive right to have the property viewed before or after the disfigurement. This is not a case in which the statute provides that the compensation and damages shall be assessed on the basis of blue prints and testimony after the highway has been completed. The State of Virginia is not satisfied with a statute of that kind because it would not give the appellee the procedural control which enables him to manipulate, negotiate, mutilate and disfigure, all at the same time,—a combination of powers operating to beat down the demands of landowners.

The Federal statute (U. S. Code, sec. 258a) furnishes no analogy because the proceedings are instituted before the mutilation is commenced, the owner is not held back, and the property is not viewed. It is incredible that argument would be advanced that the appellee is entitled to control the procedure for viewing the property after disfigurement because Section 258a has been upheld, or because of the language in *A. Backus & Sons* v. *Fort Street Depot Co.*, and in *Bragg* v. *Weaver* (appellee's brief, pp. 9, 10) which did not involve the control by the state of the viewing of the property. The appellee has simply raised a false issue, because the appellant has never contended that a taking and mutilation before assessment of compensation and damages would be unconstitutional. In *Bragg* v. *Weaver*, the Court emphasized the point that the owner was free to act on his own motion, a strong indication that control by the state is objectionable.

The statement that the Supreme Court of Appeals in the equity suit held that the statute assailed is not in violation of the due process clause (Appellee's brief, p. 11) is a bold assertion, contrary to the express words of the Court, viz., "We find it unnecessary to pass upon this contention" (182 Va. 70, 75, 76). The decision in that case is not res judicata in this proceeding, and it is not

the law of this case. Even if it had been, both the Circuit Court and the Supreme Court of Appeals in this proceeding ignored the decision in the equity suit because they expressly held in this proceeding that the statute is not in violation of the due process clause of the Fourteenth Amendment (R. 12, 41, 42). That express holding shows that both Courts ruled that the equity suit is not res judicata, and the appellee has not appealed from the ruling.

The appellee implies that the appellant can not attack the statute because he failed to set up his objection in the equity suit (Appellee's brief, p. 11). The appellee is inconsistent. In the equity suit the appellee contended in his demurrer that the appellant advanced prematurely his objection, that the filing of proceedings could be delayed, because the appellant could not show that there had been any delay (R. 31, No. 829). Now the appellee contends that the appellant was too late in advancing his second objection, concerning the appellee's mutilation of the property while delaying the view, because the appellant "knew the highway was being constructed and that original conditions would be changed" (Appellee's brief, p. 11). The appellee ignores the point that the appellant's second objection related, not to the mutilation of the property alone, but to the mutilation coupled with the appellee's arbitrary withholding of the viewing of the property by the commissioners. If the appellant was not in a position in the equity suit to object to the delay because he could not show delay in filing the proceedings, he was also not in a position to object to the withholding of the view because he could not show a withholding of the view until he could show delay in filing the proceedings. Besides, the appellee knew the highway was being constructed and that original conditions would be changed before the commissioners could view the property, so that he was not prejudiced or misled by the

fact that the appellant did not raise the objection when he filed his equity suit. A complete answer to the appellee's argument is that he made the contention of res judicata in his motion to strike (R. 19) in this proceeding, and the contention was rejected by the Circuit Court (R. 12). The appellee did not appeal from that ruling, and he is not in a position to make the same contention now.

The appellee contends that the appellant has already received compensation for the use of the property in the form of interest which is included in the award of the commissioners (Appellee's brief, p. 12). This contention is groundless. It is based upon pure conjecture. It ignores the plain evidence in the record that the commissioners were not authorized to award interest, and that they clearly indicated in their award that they did not do so. (For the appellant's answer to this contention, see below under IV. Question as to Interest Included in Award.)

III

Third Assignment of Error

Here the appellee again advances the groundless contention that the commissioners included in their award interest on the damages (Appellee's brief, pp. 12-15). (The appellant's answer to this contention is set forth below under IV. Question as to Interest Included in Award.)

The appellee makes the startling contention that insofar as the due process clause of the Fourteenth Amendment is concerned the State of Virginia could have paid the appellant the $1,500 awarded for the land taken without paying the $6,500 awarded for the damage to the residue of the appellant's property, and that the only reason the appellant is entitled to the $6,500 is that the State of Virginia, as a matter of generosity, has provided for the payment of damages to the residue (Appellee's brief, pp. 16,

17). He contends also that the Fifth Amendment does not require the United States to compensate the owner for "damages caused to his other lands" (ibid). The appellee ignores the appellant's contention that compensation for damage to the residue is required by fundamental justice, and that compensation required by fundamental justice is required by the Fourteenth Amendment. He ignores the decisions cited in the appellant's brief to support the appellant's contention. (See cases cited on pages 69, 70, and 71, in footnotes 88-96 of appellant's brief *Mitchell v. United States*, 276 U. S. 341, cited by appellee (p. 16) does not state a contrary view. There the owner claimed damages for destroying his "business," not damages to the residue of his land. There was no residue, because all of his land was taken. The case of *Chicago* v. *Taylor*, 125 U. S. 161, cited by the appellee (p. 16) is not in point because no claim was made that the Fourteenth Amendment requires payment of compensation for injury to the residue.

The reference to state constitutional provisions allowing compensation for "consequential" damages (Appellee's brief, pp. 16, 17) has no bearing upon the Fourteenth Amendment. The provisions for consequential damages amplify the coverage of the compensation mandates in the state constitutions. Due process does not need any such amplification to cover injuries to the residue. While due process does not protect against injuries to the residue that are insignificant or common to all owners affected by the public improvement, it is because the injuries are not compensable under the principles of fundamental justice, not because they are "consequential." The "consequential" test has reference, not to the extent or character of the injury, but to the manner in which the injury is inflicted, which is a significant feature of the compensation mandate but not of the due process security. It is wholly irrelevant to say that the Supreme Court of Appeals has

held that the appellant has received just compensation for the damages to the residue within the meaning of the Virginia Constitution, and that this Court must accept the decision of the Virginia Court (Appellee's brief, p. 17). The appellee does not dispute the point that if the due process security of the Fourteenth Amendment requires payment of compensation for injury to the residue of appellant's property, it requires also the payment of interest on such compensation (ibid), which is the appellant's contention (Appellant's brief, pp. 71-74).

IV

Question as to Interest Included in Award

The appellee seeks to avoid the vital issues of this controversy by relying upon the principle that this Court will not interfere with state practice. He argues that under the Virginia practice interest was included in the award and that consequently no federal question is presented. By this legerdemain he seeks to avoid not only the question of interest on the damages awarded but also the question concerning the statute assailed. In his struggling attempt to establish a Virginia "practice," the appellee proceeds "without reference to any evidence, upon proofs drawn from the clouds" (*Ohio Bell Tel. Co.* v. *Public Utilities Com. of Ohio,* 301 U. S. 292, 307). He states that the practice in Virginia is for the commissioners to include in their award "the amount of all damages sustained up to the time of their award, or in some cases up to three months thereafter" (p. 12). The only authority he has for that "practice" is *City of Richmond* v. *Goodwyn,* 132 Va. 442, which involved the Virginia statute on street widening and grading, and which has no reference whatever to the procedure under the statute assailed in this case. The *Goodwyn* case did not involve the taking of land before

the determination of compensation and damages. Condemnation proceedings were instituted, and commissioners were appointed, before the city took possession of the land. The commissioners' report was filed on October 23, 1920. The statute provided that the city could have three months after the date of the report in which to decide whether to take the property at the valuation fixed by the commissioners. After the report was filed, the city neglected to make a payment or deposit of the amount awarded, and on April 26, 1921, the owner moved to vacate the proceeding. The city then made a deposit of the amount awarded. The owner would not accept it, and claimed interest on the award from the date of the filing of the report until the time of the deposit, and interest at a different rate from that time until payment. The city did not take possession of the land. The case did not involve the question of payment of interest as compensation for the use of the land. The only question was whether interest should be paid on the award for the time between the date of the award and the date on which the city made its decision to take possession of the property. In stating that the commissioners "are presumed to have allowed for the inconveniences, damage and delay arising out of the proceedings, certainly to the date of the filing of their report, and for three months thereafter" (112 S. E. 787, 791), the Court had no reference whatever to interest or compensation for the use of the property. The Court simply meant that the commissioners in making their report were presumed to have allowed for any damage caused by the delay of the city in deciding whether to take the property at the valuation fixed by the report.

The case of *Export Leaf Tobacco Co.* v. *City of Richmond*, 163 Va. 145, cited by the appellee (p. 13), does not have the slightest bearing upon the question of interest or compensation for the use of the property. The city in-

stituted proceedings to determine the damage to the defendant's property by the grading of a street. On January 23, 1931, an order was entered awarding $30,000. On June 24, 1932, the city advised the defendant that it was ready to pay the amount awarded, but the defendant claimed interest on the amount awarded from January 23, 1931, the date of the award. Upon the city's refusal to pay interest, the owner sued for judgment in the sum of $30,000 and interest thereon from January 23, 1931. The work of grading the street was not completed until August 30, 1932, and prior to that time the owner was not interrupted in the use of his property. Therefore, there was no question in the case as to the use of the property by the city. The Court said that because of Section 3039 of the Code the amount awarded as compensation had the effect of a judgment (175 S. E. 753, 755), and that the right to the award begins as soon as the street grade is established pursuant to the statute, and the award having the effect of a judgment bears interest from the date the award becomes final (175 S. E. 753, 757). One will search in vain for any evidence in this case upon which to base any "practice" in Virginia.

To overcome the weakness of this showing of the Virginia "practice," the appellee turns to the "practice" in West Virginia, Massachusetts, and Oklahoma, to reinforce his theory of what the practice is or should be in Virginia. The first precedent is *State* v. *Painter*, 120 W. Va. 486. To make this case appear as a reflection of the Virginia practice, the appellee states that the West Virginia statutory proceedings are "quite similar" to those in Virginia, but he fails to point out all of the differences. He also fails to quote passages from the decision in which the Court outlines the conditions under which the Court may add interest to the verdict. The Virginia statute, Section 1969j (2) of the Code, requires the commissioners to ascertain what will be a just compensation "for the land or other

property, or for the interest or estate therein, proposed to be condemned * * * and to award the damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of the highway * * *" It provides that the commissioners "shall fix the value of the land taken and the damages, if any, which may accrue to the residue." The West Virginia statute, Section 5380 of the Code, provides on the other hand that the commissioners shall ascertain what will be a "just compensation to the person entitled thereto" for the land taken, and for damage to the residue. The West Virginia statute does not say that the commissioners shall "fix the value of the land taken," as the Virginia statute requires. Section 5381 of the West Virginia Code provides that after the commissioners' report either party may demand that the question of "the compensation to be paid" be ascertained by a jury, and that the cause shall be tried "as other causes" in the court and that the jury, ascertaining the damage or compensation "to which the owner of the land proposed to be taken is entitled," shall be governed by Section 5380. Obviously, the statutes and the procedures of the two states are entirely different, and there is nothing to support the appellee's assertion that the proceedings are "quite similar." The dissimilarity is adroitly evaded by the appellee. He has resorted to an adumbration of the procedures in the two states in an effort to convince the Court that the appellant's appeal should be dismissed for the lack of a properly presented substantial federal question. Instead, the Court should dismiss his argument for the reason that he has improperly and disingenuously presented a superficial and an unsubstantial analogy between the two procedures. The Virginia statute confines the commissioners' award to "the value of the land taken" and the damages to the residue, while the West Virginia statute allows the commissioners to determine the "just

compensation to the person entitled thereto . . . ," and provides that the jury may ascertain the damage or compensation "to which the owner" is entitled. A practice followed in determining just compensation to the owner is not a proper precedent for a practice in determining the value of the land.

The Massachusetts procedure is not in point at all. In *Minot* v. *Boston*, 201 Mass. 10, cited by the appellee (pp. 14, 15) the Court pointed out plainly that in that state the jury constitutes the only tribunal to determine the damages and that "it was not only in their power, but it was their duty, to fix the amount due" (201 Mass. 10, 12). The Court instructed the jury that the measure of damages was "the fair value of the land taken upon the whole evidence" (ibid). In Oklahoma, as shown in *Blackwell* v. *Bebout*, 19 Okla. 63 (Appellee's brief, p. 14), it is the duty of the jury "to assess the entire damages" (91 P. 877, 882). The practice there has no bearing at all upon the Virginia practice.

In all of these cases the juries were not only clearly authorized and under a duty to determine the entire amount to which the owner was entitled, embracing the value of the land, the damages and interest, but the verdicts were of a general nature, and there was nothing to indicate that they confined their awards to the value of the land or to the fee simple title to the land, and there was nothing to indicate that they did not consider compensation for the use of the land. In *State* v. *Painter*, the commissioners reported the sum of $1,100 as just compensation for the land taken, but the jury in rendering a general verdict "found in favor of the condemnee in the amount of $1,700" (199 S. E. 372, 373). In *Minot* v. *Boston*, the jury rendered their verdict "upon the whole evidence," and it is not indicated that they restricted their verdict to the land and did not

consider the use thereof (201 Mass. 10, 12). In *Blackwell* v. *Bebout*, the jury rendered a general verdict for damages (91 P. 877, 882).

Thus the question is determined, not by the state "practice," but by considering (1) the authority of the commissioners or jury derived from the statute, or from the oath taken, or from the instructions, and (2) the recitals in the report or verdict.

In *Moll* v. *Sanitary District*, 228 Ill. 633, cited by the appellant (pages 45, and 73 of brief) the Court said that the jury was empaneled, not to assess the value of the property taken or damaged, but in the language of the oath required by the statute to be administered "to well and truly ascertain and report just compensation to the owner of the property which it is sought to take or damage * * * according to the facts in the case as the same may be made to appear by the evidence. (228 Ill. 633, 636). The Court said further: "This just compensation, according to the facts in this case, included not only the value of the property at the time of the filing of the petition, but the use of the property from the time the petitioners took possession, measured by the interest for that time on the value of the property as found by the jury" (ibid).

The Court has ample authority to add interest to the amount awarded where the authority of the commissioners to include interest is withheld, or where it is indicated that they confined their award to the value of the land or of the fee simple title. In *State* v. *Painter*, the Court said: "Where, in a condemnation proceeding, the property is actually taken before the verdict, the trial court, applying the rule of the *Simms* case, would have the right to add interest to the amount of the verdict, provided that the record discloses that the jury allowed no interest or where the court, by instruction, reserved the question of interest until after the verdict, and the dates between which interest

should run are so reasonably ascertainable from the record that the court could make the computation and render judgment for the aggregate amount of the verdict and interest. *St. Louis, El Reno & Western Ry. Co.* v. *Oliver*, 17 Okla. 589, 87 P. 423, 10 Ann. Cas. 748; *Blackwell, Enid & Southwestern Railway Co.* v. *Bebout*, 19 Okla. 63, 91 P. 877, 14 Ann. Cas. 1145; *10 Ruling Case Law*, 144 notes 8 and 9; *1 Nichols Eminent Domain*, page 656" (199 S. E. 372, 374).

In *Alloway* v. *Nashville*, 88 Tenn. 510, 13 S. W. 123, quoted with approval by the Virginia Court in *City of Richmond* v. *Goodwyn*, 132 Va. 442, no instruction on the subject of interest was given or requested. After verdict, and before judgment, the owner moved the Court to add interest, which was refused. On appeal the Court said: "Refusal to allow interest was error. In the language of one of the counsel for appellants: 'If the party in whose favor there is verdict is, as a matter of law, entitled to something additional, the court may allow it.' Inasmuch as the error can be readily corrected here, that will be done, instead of reversing and remanding. This court will render the judgment that should have been rendered below. The land was taken about the 10th of August, 1887; hence judgment will be entered for the amount of the verdict, with interest from that date" (13 S. W. 123, 127).

The appellant contends that it is plainly shown by the order appointing the commissioners and by the oath administered to them that they were confined to a determination of the value of the land taken and the damages to the residue, and that the report of the commissioners clearly indicates that they did not include interest or any other sum as compensation for the use of the property or on the damages for injury to the residue. The commissioners were appointed to "ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for highway

uses, and to award damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of said highway * * *" (R. 13), and the commissioners made oath that they would ascertain "what will be a just compensation for the land or other property of the defendants, or for the interest or estate therein, proposed to be condemned for highway uses, and to award the damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of said highway * * *" (R. 13, 14). Thus the commissioners were expressly restricted to the ascertainment of just compensation for the land and damages to the other property of the appellant. Because of these restrictions contained in the order appointing the commissioners and in the oath administered to them, they had no authority whatever to ascertain what would be just compensation to the appellant "according to the facts" in the case, and without that authority they could not award interest as compensation for the use of the land and as compensation for the delay in payment of the damages.

The appellant contends further that by their report the commissioners disclosed in unmistakable terms that they confined their award to the value of the land and did not award anything for the use of the land by way of interest or otherwise and did not award interest on the damages to the residue. Clearly it can not be presumed that the commissioners violated the oath which was administered to them, and the language of the report must be considered in the light of the oath. The language of the report is as follows: "* * * we are of the opinion and find that for the fee simple title of the Defendant in the 3.98 acres of land, more or less, the sum of $1,500.00 will be a just compensation, and that there was $6,500 damages resulting to the adjacent or other property of the owner from the construction and opera-

tion of said highway * * *" (R. 28, 29). If the commissioners had awarded interest for the use of the land they would not have recited that for the "fee simple title" the sum of $1,500 will be a just compensation. There is no relation between the fee simple title to be acquired by the appellee and the use of the land before acquiring that title. It is pure conjecture to conclude that while the commissioners did not award interest for the use of the land taken, but confined the award to the value of the fee simple title to be acquired, still they awarded interest on the damages to the residue.

The fact that no instructions were given or requested on the subject of interest is simply evidence that neither the Court nor the parties considered that the commissioners were authorized to award interest. The absence of instructions can not operate to authorize the commissioners to include in their award something which by the statute, by the order of appointment, and by the oath, they were not authorized to include. The same observation can be made as to the fact that the commissioners knew when the appellee entered the land, and as to the fact that the commissioners knew when they viewed the land that the appellee had been on the land constructing the highway for many months. Their authority to award interest derives from the order appointing them and from the oath administered to them, not from their knowledge of the facts of the case, and there was nothing in the order or in the oath upon which to base the authority to award interest.

That the appellee's counsel in the trial court considered that interest was not awarded by the commissioners is shown by the language in his exceptions to their award. He stated: "* * * the report valued the 3.98 acres of land, more or less, actually taken for road purposes, at $1,500.00, and the damages resulting to the adjacent or other property of the owner at $6,500" (R. 30). In his

opinion, therefore, the award was for the value of the land, not for the use of the land, and for damages to the property of the appellant, not for the damages to the appellant. It is inconsistent for the appellee to claim now that the award included interest as compensation for use, and it is inconsistent for him to claim that the award included damages to the appellant by way of interest on the damages resulting to the residue of the appellant's property.

That the trial Court considered that interest was not awarded by the commissioners is shown by the fact that the Court did not allow any interest from the date of the report of the commissioners, July 12, 1944 (R. 28), until the date of the final decree, August 11, 1944 (R. 33). If the trial Court had denied interest on the theory that the commissioners' award included interest, the Court would have taken the position that no interest would be added to the award because the award included interest up to the date of the award; but the Court would have allowed interest from the date of the award, just as the Court did in *State* v. *Painter*, 120 W. Va. 486. The Court ruled that the claim for interest from October 15, 1941, until payment, be denied (R. 35). The Court allowed interest from the date of the decree, August 11, 1944 (R. 36), not from the date of the award, July 12, 1944 (R. 28). To say that the award included interest from the date of taking possession, October 15, 1941 (R. 7) until the date of the award, July 12, 1944 (R. 28) is to contradict the ruling of the Court that interest should be added to the award from the date of the decree, August 11, 1944 (R. 36) and not from the date of the award, July 12, 1944 (R. 28).

Since it can not be shown by way of state "practice," or otherwise, that the commissioners or the Court allowed compensation for the use of the property taken for the highway, or any interest on the damages to the residue, for the period of one month from the date of the award,

July 12, 1944 (R. 28) until the date of the decree confirming the award, August 11, 1944 (R. 36), the appellant is entitled to compensation for use and to interest on the damages for that period of time even though the Court should uphold the appellee's contention that because of the state "practice" the award included interest from the date possession was taken until the date of the award. This amount can not be disregarded as too insignificant for the court to consider. The appellant claims compensation of $200 a month for the use of the property, and the interest on the $6,500 would be $32.50. The Court can not be fair and say that the claim of $232.50 is so insignificant that the appellant has not presented a substantial federal question, and that the appeal should be dismissed at the cost of the appellant. The costs will run over $1,000, including the printing of the record and briefs in the state Court and in this Court. If the appeal is dismissed under these circumstances, the inevitable conclusion will be that only those with wealth and large claims can expect to get any relief from the Fourteenth Amendment.

The appellee cites *Danforth* v. *United States*, 308 U. S. 271, to show that the "time for taking other lands does not necessarily control" (Appellee's brief, p. 15). It is not the time of taking other lands, but it is the time the damage is done that controls (*United States* v. *Grizzard*, 219 U. S. 180; *Jacobs* v. *United States*, 290 U. S. 13). The damage to the residue was commenced when the appellee began to excavate with his steam shovels and heavy equipment on the appellant's property and to throw dirt and rocks on the appellant's bottom land and meadow in the construction of the fill across the property, October 15, 1941 (R. 7). To hold that the damage to the residue was not caused until the date of the award would be to ignore the facts of the case.

The false and subtle notion that because of state "practice" the appellant can not present a substantial federal question cheapens and degrades the securities of the Constitution of the United States (Cf. *Snyder* v. *Mass.*, 291 U. S. 97, 122). The appellant has already been victimized by the artificial conduct of the appellee when he thwarted the appellant's attack on the statute, and caused the appellant to suffer great costs and expense, by instituting the condemnation proceedings at the strategic time, after waiting one year and eight months from the time he seized the property, and by that means obtaining a ruling favorable to him (*Bailey* v. *Anderson*, 182 Va. 70; cert. den. 321 U. S. 799). Now the appellee seeks by the same sort of strategy to prevent this Court from considering the second attack on the statute made on a different ground. This Court will not blindly accept the appellee's loose argument without exposing its falsity, and the subtle purpose behind it. To do so would greatly disillusion those who cling to the belief that substantial rights protected by the Fourteenth Amendment can not be frittered away by sophistry, or by the effrontery and indifference of state representatives.

Conclusion

The appeal should not be dismissed for want of a properly presented federal question.

Respectfully submitted,

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Pro se.